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9 IN THE UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA,
12 Plaintiff,
13 v.
14 JOSHUA S. LEONARD,
15 Defendant.

CASE NO. 1:20-CR-00026 NONE-SKO
MOTION TO EXCLUDE TIME UNDER SPEEDY
TRIAL ACT; [PROPOSED] FINDINGS AND
ORDER

16
17 **I. INTRODUCTION**

18 On March 19, 2020, the Court by Minute Order vacated the existing trial confirmation and trial
19 dates in this matter and continued them for a trial setting conference in early May and excluding time
20 under the Speedy Trial Act. Doc. 18 (the “Minute Order”). Following the Court’s Minute Order, the
21 United States attempted to enter into a stipulation with the defendant confirming that both parties
22 supported the Court’s continuance and Speedy Trial Act exclusion. On March 26, 2020, defense
23 counsel indicated that defendant refused to stipulate to either the continuance or Speedy Trial Act
24 exclusion. Accordingly, the United States now presents further authority supporting the continuance
25 and exclusion and requests the Court make further Findings and specific Order in this Case.

26
27 **II. BACKGROUND**

28 At the defendant’s arraignment in mid-February 2020, the defendant requested a speedy trial and

declined to waive time under the Speedy Trial Act; the case was accordingly set for trial confirmation hearing on March 27, 2020 and jury trial on April 14, 2020. Doc. 7. Since that time, the Court has issued several General Orders related to the COVID-19 pandemic, including General Orders 611 and 612. In particular, on March 17, 2020, the Court entered General Order 611, suspending all jury trials in the Eastern District of California scheduled to commence before May 1, 2020, as part of an effort to address public health concerns related to COVID-19. On March 18, 2020, General Order 612 issued. That Order closed each of the courthouses in the Eastern District of California to the public. It further authorized assigned district court judges to continue criminal matters after May 1, 2020 and excluding time under the Speedy Trial Act; General Order 612 incorporated General Order 611's findings regarding the health dangers posed by the pandemic, and added additional findings to support the exclusion in the judge's discretion.

The State has also continued to take action to combat the COVID-19 pandemic. As of March 19, 2020, the Governor for the State of California entered a state-wide shelter-in-place order, requiring everyone in the State to stay in their homes except for essential outings, such as to obtain food, prescriptions or healthcare services. <https://www.cnn.com/2020/03/19/us/california-coronavirus-stay-home-order/index.html>.

On March 19, 2020, the Court issued the Minute Order. Relying on the General Orders, it continued the matter until a trial setting conference on May 8, 2020 at 8:30 a.m. Doc. 18. The Minute Order excluded time under the Speedy Trial Act, 18 U.S.C. § 3161(h)(7) from the date of the Minute Order to May 8, 2020, finding "that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial in light of the public health emergency posed by the coronavirus (COVID-19) outbreak and the circumstances more fully explained in this court's General Orders 611 and 612."

III. ARGUMENT

The Speedy Trial Act generally requires that a defendant be brought to trial within seventy days of first appearance, 18 U.S.C. § 3161(c)(1), but time can be excluded from that period for several reasons, including when the ends of justice require it. Ends-of-justice continuances are excludable

1 where “the judge granted such continuance on the basis of his findings that the ends of justice served by
2 taking such action outweigh the best interest of the public and the defendant in a speedy trial.” 18 U.S.C.
3 § 3161(h)(7)(A). No such period is excludable unless “the court sets forth, in the record of the case,
4 either orally or in writing, its reason or finding that the ends of justice served by the granting of such
5 continuance outweigh the best interests of the public and the defendant in a speedy trial.” *Id.* The Act
6 contains a number of non-exclusive factors that should be considered before a court authorizes an ends-
7 of-justice continuance. *Id.* at 3161(h)(7)(B). Accordingly, the Act allows ends-of-justice exclusion, but
8 only after a court considers and makes findings that support the exclusion.

9 Although General Order 611 addresses the district-wide health concern, the Supreme Court has
10 emphasized that the Speedy Trial Act’s ends-of-justice provision “counteract[s] substantive
11 openendedness with procedural strictness,” “demand[ing] on-the-record findings” in a particular case
12 following a court’s consideration of the factors set forth in the statute. *Zedner v. United States*, 547 U.S.
13 489, 509 (2006). “[W]ithout on-the-record findings, there can be no exclusion under” § 3161(h)(7)(A).
14 *Id.* at 507. And moreover, any such failure cannot be harmless. *Id.* at 509 (construing ends-of-justice
15 continuance granted under former section (h)(8)(A) and concluding that failure to make findings
16 constituted reversible error); *see also United States v. Ramirez-Cortez*, 213 F.3d 1149, 1153 (9th Cir.
17 2000) (explaining that a judge ordering and ends-of-justice continuance must set forth explicit findings
18 on the record “either orally or in writing”). Based on the plain text of the Speedy Trial Act—which
19 *Zedner* emphasizes as mandatory—the Government seeks to ensure that the Minute Order’s finding is
20 fully supported by individualized findings and written Order.

21 General Order 611 excludes delay in the “ends of justice.” 18 U.S.C. § 3161(h)(7) (Local Code
22 T4). Although the Speedy Trial Act does not directly address continuances stemming from pandemics,
23 natural disasters, or other emergencies, this Court has discretion to order a continuance in such
24 circumstances. For example, the Ninth Circuit affirmed a district court’s two-week ends-of-justice
25 exclusion following Mt. St. Helens’ eruption, where the district court found that the state of emergency
26 made it impossible to proceed. *Furlow v. United States*, 644 F.2d 764 (9th Cir. 1981). As the Ninth
27 Circuit noted, the ends –of-justice continuance can be proper where the record makes clear that there
28 would be “appreciable difficulty” to proceeding to trial during an emergency. *Id.* Various other states

1 of emergency that disrupt court operations and the ability to assemble court staff, jurors, witnesses and
2 other personnel required for trial may also serve as bases for ends-of-justice continuances. *See United*
3 *States v. Scott*, 245 Fed. App'x 391, 394 (5th Cir. 2007) (upholding ends-of-justice continuance during
4 Hurricane Katrina). Accord; *United States v. Richman*, 600 F.2d 286, 292, 293-94 (1st Cir. 1979)
5 (approving continuance granted following “a paralyzing blizzard.”); *United States v. Correa*, 182 F.
6 Supp. 326, 329 (S.D.N.Y. 2001) (citing *Furlow* to exclude time following the September 11, 2001
7 terrorist attacks and the resultant public emergency). As General Orders 611 and 612 note (and as
8 confirmed by continuing developments since their issuance) COVID-19 presents just such an
9 emergency.

10 Indeed, even continuances granted when single attorneys, agents, and witnesses become
11 unavailable comport with the Act. *See, e.g., United States v. Stallings*, 701 F. App'x 164, 170-71 (3d
12 Cir. 2017) (prosecutor had “family emergency” requiring “out-of-state travel with no certain return
13 date”); *United States v. Hale*, 685 F.3d 522, 533-36 (5th Cir. 2012) (primary case agent had “immediate
14 and catastrophic family medical emergency”); *Richman*, 600 F.2d at 292, 294 (informant hospitalized).
15 The coronavirus is posing a similar, albeit more enduring, barrier to the prompt proceedings mandated
16 by the statutory rules.

17 This Court generally has “[b]road discretion” to grant continuances. *Morris v. Slappy*, 461 U.S.
18 1, 11 (1983). Here, in addition to the public health concerns cited by General Order 611 and presented
19 by the evolving COVID-19 pandemic, an ends-of-justice delay is particularly apt in this case because the
20 trial involves participants and witnesses with high-risk factors, such as age, medical conditions, etc. The
21 victim in this case also would have to travel by plane to attend the trial from South Carolina.
22 Additionally, counsel and other relevant individuals have been mandated to telework and minimize
23 personal contact to the greatest extent possible and everyone in California is now ordered to adhere to
24 strict shelter-in-place protocols. It will be difficult to avoid personal contact should the trial proceed.

25 Based on the above-stated findings, the ends of justice served by continuing the case as requested
26 outweigh the interest of the public and the defendant in a trial within the original date prescribed by the
27 Speedy Trial Act.
28

IV. CONCLUSION

For the foregoing reasons, the United States moves the Court issue written findings and an Order affirming the continuance to May 8, 2020 and excluding time under the ends-of-justice provisions of the Speedy Trial Act, 18 U.S.C. § 3161(h)(7)(A). Specifically, the United States requests that the Court find that the ends of justice (in light of the global pandemic and its effects on the court system and witness safety and travel) served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

Dated: March 30, 2020

Respectfully submitted,

McGREGOR W. SCOTT
United States Attorney

/s/ MICHAEL G. TIERNEY
MICHAEL G. TIERNEY
Assistant United States Attorney

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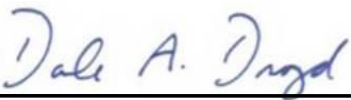
1 **FINDINGS AND ORDER**

2 The Court has read and considered the government's Motion to Exclude Time Under Speedy
3 Trial Act. The Court hereby finds that the Motion, plus the outbreak of the novel coronavirus known as
4 COVID-19 (and related General Orders of this Court and guidance from the Centers for Disease Control
5 and Prevention and state and local health officials), collectively demonstrate facts that provide good
6 cause for a finding of excludable time pursuant to the Speedy Trial Act, 18 U.S.C. § 3161(h)(7)(A).

7 The Court further finds that: (i) the ends of justice served by the continuance outweigh the best
8 interest of the public and defendant in a speedy trial; and (ii) failure to grant the continuance would
9 result in a miscarriage of justice, given the emergence of the novel coronavirus in the Eastern District of
10 California and beyond, and the necessary steps being taken to avoid further transmission of the virus.
11 Time is excluded under the Speedy Trial Act between March 27, 2020 and May 8, 2020.¹

12 IT IS SO ORDERED.

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14 Dated: March 31, 2020

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16 UNITED STATES DISTRICT JUDGE

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25 ¹ In issuing this order the court in no way is suggesting that its Minute Order issued in this case
26 on March 19, 2020 (Doc. No. 19) excluding time was in any way inadequate under either Supreme
27 Court or Ninth Circuit authority. Indeed, in the undersigned's view, in excluding time under the Speedy
28 Trial Act the court's March 19, 2020 order made written on-the-record findings in this particular case
following the court's consideration of the factors set forth in the statute, in keeping with the decisions in
Zedner v. United States, 547 U.S. 489, 509 (2006) and *United States v. Ramirez-Cortez*, 213 F.3d 1149,
1153 (9th Cir. 2000). Nonetheless, and only out of an over-abundance of caution is the court issuing
this order.